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September 26, 2002

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Notice of Ex Parte Communication in CS Docket Nos. 98-120,
00-96 & 00-2

Dear Ms. Dortch:

On September 24, 2002, Jon Blake and Amy Levine of Covington & Burling; Michael Berg of Shook, Hardy & Bacon L.L.P.; and Doug Macrae of VideoGuide, Inc., on behalf of Gemstar-TV Guide International, Inc. ("Gemstar"), met with Susan Eid, legal advisor to Chairman Powell, to discuss what constitutes "program-related material" in the digital context. A copy of a handout distributed at the meeting is attached.

We discussed how best to determine what constitutes "program-related material" in the digital context and why EPGs should fall within the scope of what is program-related. The Commission has full statutory authority to interpret program-relatedness in a way that makes sense for, and facilitates the development of, digital technologies, including EPGs. A flexible approach to determining what counts as "program-related material" is consistent with the intent of Congress when it adopted various carriage requirements in 1992 and with the intent of the Commission at the time it adopted the *WGN* test as guidance for implementing the Act. It is also consistent with the *WGN* decision and will benefit consumers by allowing them to take advantage of innovative new technologies with the potential to enhance greatly the viewing experience.

In the digital world, EPG information is assembled from data transmitted to the television receiver along with a digital broadcast signal, at times when bandwidth use is low, to be called up later by the viewer and reassembled by Gemstar's *Guide Plus+* service. Transmitting information about a program at the same time the program is being viewed is just not possible using digital technology because use of digital channels is fluid, and channel 4.2 showing a movie that begins at 3:00 p.m. may not be in use or may not even exist at 2:59 p.m. Digital

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technology also facilitates the transmission of aggregated information about various TV-station and cable-channel program offerings. A proper interpretation of the *WGN* test will fully accommodate the efficient, bursty transmission of bits that is the hallmark of digital technology, consistent with how this test was originally conceived and adopted. The application of an unduly limited interpretation of "program-related" to digital content will stymie the potential of innovative program-related services that are spectrum efficient and enhance consumer welfare. The Commission's decision with respect to program-related material is critical because it will determine whether any independent EPG provider can survive and whether homes served by over-the-air television will have access to any EPG service.

We also discussed why any stripping of the data that enables Gemstar's EPG service will result in the unavailability of this service to *any* consumers and why the availability of an independent EPG over cable is critical, even if it is not available on DBS. The chip that enables Gemstar's EPG service is installed in receivers by manufacturers. If a cable operator reaches into a broadcaster's signal to strip Gemstar's EPG data out of it, the guide will not work, and consumers who purchased a receiver equipped with *Guide Plus+* functionality will return it to the point of purchase. When consumers return receivers, manufacturers cease installing enabling chips in their sets *nationwide*. For example, several years ago, Time Warner began stripping Gemstar's EPG data out of broadcast signals in Columbia, South Carolina. Although this action affected only a fraction of one percent of the population of the United States, some manufacturers cited this as a significant issue in deciding not to produce future guide-equipped models, resulting in the unavailability of any program guide to cable-ready and over-the-air customers nationwide who purchased sets from them. Although no cable operators are stripping at present, Time Warner has indicated its willingness to strip Gemstar's guide data in the future, and all that is required for consumers to be denied access to a program guide is for Time Warner to begin stripping in a single market.

The same effects are not present with respect to DBS customers. Although Gemstar's EPG is not available on DBS, all DBS providers offer their own programming guide, which means that stripping of guide information by DBS does not create a return at retail of a guide-equipped television set. The same cannot be said of cable because in many configurations, for example with cable-ready hook-ups, subscribers will not receive a guide. Regardless, the unavailability of Gemstar's guide on DBS, as well as the fact that cable operators are not at present stripping enabling data, does not change the analysis that the guide is program-related under the *WGN* factors as originally articulated by Judge Posner and adopted by the FCC in 1993 and 1994 in implementing the 1992 Cable Act.

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Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Amy Levine".

Jonathan D. Blake
Amy L. Levine
Covington & Burling
*Counsel to Gemstar-TV
Guide International, Inc.*

Attachment

cc: Ms. Susan Eid
Mr. Michael Berg

DEFINITION OF PROGRAM-RELATED MATERIAL

When the Commission adopted rules in 1993 implementing the 1992 Cable Act requirement that cable operators carry "program-related material," it turned to a ten-year-old copyright case examining program-relatedness in a different context for guidance. That court's definition of what material is "program-related" and the FCC's adoption of that definition as guidance supports a broader reading of the term than what cable now argues for in the digital carriage proceeding.

The *WGN* Case (1982):

The service that WGN held to be program-related contained information about programming not then being viewed: "The teletext channel is to contain an announcement of future programming on WGN. The viewer of the nine o'clock news, a compendium not all parts of which may interest every viewer, is thus invited to switch to the teletext channel when his attention to the news flags, to see what is forthcoming on WGN." (p. 627)

FCC's Analog Carriage Order Defining "Program-Related" (1993):

The WGN factors are not limiting but are intended to provide guidance: "[W]e believe the best guidance for what constitutes program-related material is to be found in the factors enumerated in *WGN Continental Broadcasting*." (§ 81)

The WGN factors are not an ironclad definition of "program-related"; the FCC adopted instead a flexible definition to accommodate innovation: "Carriage of information on a stations's [sic] VBI is rapidly evolving: thus, we believe no hard and fast definition can now be developed." (§ 81)

FCC's Analog Carriage Recon Order (1994):

The WGN factors are not exclusive: "[O]n reconsideration, we clarify that the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness. We believe there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute." (§ 50)

Nielsen Source Identification Codes ("SID codes") are clearly program-related despite failing to satisfy the WGN factors: "[O]n reconsideration, although SID codes may not precisely meet each factor in *WGN*, we find that they are program-related under the statute." (§ 50)

Future programming schedules and other information not directly linked to the program-then being broadcast are program-related: "The court accepted [information about] WGN's future programming schedules as an 'integral part of the program.' . . . [T]he WGN VBI information not only included local news, but also contained future programming schedules for WGN, and the court upheld the VBI as one copyrightable expression with the video signal." (§ 44)